INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	9
CONCLUSION	13

CITATIONS

Cases:

Borough of Lansdale, Pa. v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974)	12
Federal Power Commission v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)	11
Ford Motor Co. v. *NLRB*, 305 U.S. 364, 373; 59 S.Ct. 301, 307; 83 L.Ed. 221 (1939).	10
Natural Gas Pipe Line Company v. *FPC*, 128 F.2d 481, 484 (7th Cir. 1942)	10
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)	11

Statutes:

Federal Power Act, 16 U.S.C. 792, *et seq.* 6, 9, 11, 12

BLEED THR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1421

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
SAM RAYBURN DAM ELECTRIC COOPERATIVE,
MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR RESPONDENT MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (App. A of Petition) is reported at —— U.S. App. D.C. ——, 515 F.2d 998 (1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

OUGH

QUESTIONS PRESENTED

I. Was the court below correct in holding that Mid-South's application to the Federal Power Commission for rehearing was timely filed and therefore the court had jurisdiction over Mid-South's petition for review?

II. Whether the *Mobile-Sierra* doctrine, which prevents unilateral rate filing contrary to contractual obligations, includes in its protection contracts amended pursuant to the basic tenet of contract law that a contract may be modified by the mutual course of dealing between the parties?

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

STATEMENT

This litigation involves an attempt by Gulf States Utilities Company ("Gulf States") to unilaterally impose rate increases on two of its wholesale customers, Mid-South Electric Cooperative Association ("Mid-South") and Sam Rayburn Dam Electric Cooperative ("Sam Rayburn") contrary to the terms of the contracts existing between Gulf States and these wholesale customers. The issues relating to the Sam Rayburn rates are different from those having to do with the Mid-South rates. In this brief submitted on behalf of Mid-South, we shall discuss only the Mid-South issues.

On April 10, 1973 Gulf States tendered for filing with the Federal Power Commission revised rate schedules which increased its wholesale rates to Mid-South and other customers. The new rates represented an increase in costs to Mid-South of 52.3%. Mid-South, Sam Rayburn, and other wholesale customers protested the filing and petitioned the Commission to reject it on the grounds

that the proposed increase was barred by the *Mobile-Sierra* rule of this Court, *supra*.

In its protest, Mid-South relied upon the contract between it and Gulf States, dated September 21, 1950. On March 1, 1965 that contract was amended to extend the term thereof "until April 1, 1970 and thereafter for successive five-year periods until terminated by written notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof." (R. 252)[1]

No notice of termination was given by either party until April 1, 1970. Accordingly, the contract remained in effect until April 1, 1975.

The provision of the September 21, 1950 contract significant here reads as follows:

"ARTICLE III

"Contract Power

* * * *

"B. The initial total commitment of Company at all points of delivery to Customer at the date of Signature of this agreement, and as specified in Article I, shall be a maximum of 200 kilowatts. Customer shall have the right from time to time to request an increase in such maximum commitment of Company up to a total of 300 kilowatts at all points of delivery, provided that Customer shall give Company reasonable notice in writing of its desire to increase its requirements from Company, specifying the point or points of delivery at which such increase will be required, the locations of which points are agreeable to the Company, and the nature of the load contemplated. Company will then make such additional power available to Customer at the points so specified or will designate other points at which the required power is available. (R. 233)"

[1] "R" references herein are to the record in the court below.

Mid-South's position before the Commission was that the contract which had been entered into when Mid-South, a rural electrification cooperative, was first organized had been amended by the action of the parties to remove the ceiling of 300 kilowatts initialy contained in the contract. Shortly after the contract was executed, the parties, by their action, had indicated that the 300 kilowatts limitation was to be eliminated. As early as August 14, 1951, Gulf States informed the Commission of an additional point of service requested by Mid-South (R. 243) which was almost certain to result in the 300 kilowatts limitation being exceeded. When Gulf States again informed the Commission on December 14, 1953 of the addition of another delivery point (R. 244) it became certain that the 300 kilowatt limitation was no longer intended by the parties to be continued in the contract, as the sales under the contract were then going to be greatly in excess of that figure.

Of the total of six such notices Gulf States gave to the Commission mentioned in the record, the smallest estimated additional load set forth in any one was 200 kilowatts. The April 19, 1975 notice (R. 274) announced the additional three points of delivery requested by Mid-South represented total estimated loads of 900 kilowatts. These points of delivery in themselves would represent three times the initial maximum contractual commitment, were it still in effect. On August 4, 1972, Gulf States informed the Commission of additional delivery points which alone had estimated loads of 900 kilowatts (R. 253).

The actual loads experienced turned out to be greatly in excess of the estimates. Thus, by 1960 the total peak load of Mid-South supplied by Gulf States under the contract was 1374 kilowatts. In 1961, that figure was 1425; in 1965, 3644; in 1966, 4140; in 1967, 4873; in 1968, 5493; in 1969, 5847; in 1970, 7842; in 1971, 8981; in

1972, 10,936; and in 1973, 11,940 (R. 1173). A mere glance at these figures reveals the fatuous nonsense of contending that any sales in excess of 300 kilowatts were "outside the contract demand parameters."

It must also be emphasized that the sale of all kilowatts by Gulf States to the Mid-South, including the 11,940 in 1973, were made strictly in accordance with all of the provisions of the contract. These included provisions relating to: the location of the points of delivery (selected by Mid-South with the approval of Gulf States); the type of service; installations to be furnished by Mid-South; rate to be paid by Mid-South; minimum charge; transformation; metering; payment of bills; continuity of service; and liability.

On March 7, 1960, the parties entered into a written amendment extending the term of the contract for a five-year period (R. 250-251). On March 1, 1965, the parties entered into another written amendment extending the contract for an initial period of five years and thereafter for successive five-year period unless terminated by writen notice given by either party to the other one year prior to the expiration of the initial term or any extension thereof. The amendment also substituted a revised rate schedule for the schedule then in effect (R. 252). The new rate schedule was applied by Gulf States to all of the kilowatts sold under the contract. By 1960, the sales under the contract amounted to more than 1300 kilowatts. By 1965, such sales amounted to more than 2800 kilowatts. Here again, it is incredulous that it could be argued that the parties intended the sales under the contract be limited to 300 kilowatts, when the actual sales thereunder at the time of the amendment amounted to more than nine times that amount. Certainly, the contract would have been amended to describe the circumstances which actually existed at that time if the parties had not considered the limitation on the contractual commitment long since deleted from the contract.

D THROUGH

It is also noteworthy that in the March 1, 1965 letter of amendment (R. 252), Gulf States indicates that it proposes to amend the contract by substituting the revised attached rate schedule "for the existing Rate Schedule REA dated July 1, 1955, now in effect in the agreement". This certainly constitutes further evidence that Gulf States intended all sales made by it under the new rate schedule to be made under the contract. By accepting the agreement in writing, Mid-South indicated the same intent. Likewise, the revised rate schedule (R. 249), itself, specified that service thereunder was "subject to the terms and conditions specified in the Agreement for Electric Service to Rural Cooperatives to which this schedule is attached and made a part hereof."

Equally significant is the statement made in each of Gulf States' letters to the Commission informing the latter of a new delivery point being made available at the request of Mid-South (R. 243, 244, 245, 246, 247 and 253), that the delivery point was being made available "in accordance with the contract" between Gulf States and Mid-South.

In an order issued June 14, 1973 (R. 1034-1056), the Commission held that the contract between Gulf States and Mid-South was a fixed rate contract and the rates therein could not be changed by unilateral filing pursuant to Sec. 205 of the Federal Power Act. The order discussed various contracts affected by Gulf States' filing but included no specific discussion of the Mid-South contract. The order did contain this comment:

> "With regard to deliveries in excess of the maximum contractual commitments of Gulf States under these fixed rate contracts, we shall accept the new rates applied for herein as an initial filing to become effective June 15, 1973, the requested effective date, and institute an investigation under Section 206 to determine if such rates are in the public interest." (R. 1037)

However, the ordering portion of the order did refer to a list of rate schedules by number, which included the Mid-South rate schedule.

Mid-South did not file an application for rehearing in respect of the June 14, 1973 order for the reason that it was of opinion that its contract no longer contained a "maximum contractual commitment" because such contract had been modified by the conduct of the parties so as to delete the "maximum contractual commitment" initially specified in the contract. Mid-South assumed that the order must be discussing other contracts which contained a maximum contractual commitment.

Other wholesale customers of Gulf States did apply for a rehearing of the June 14 order. On August 7, 1973, the Commission issued an order in which it discussed various applications for rehearing which had been filed and which did request that the Commission hold that the practices and deliveries by Gulf States of all amounts of power under the rate schedule, whether or not in excess of a maximum contractual commitment, are at a fixed rate not subject to unilateral change by Gulf States and that the Commission revise the June 14 order so as not to treat as an initial filing deliveries in excess of Gulf States' maximum contractual commitment. The discussion by the Commission in that order for the first time caused Mid-South to realize that the Commission might hold in the case of a contract which initially contained a limitation on Gulf States' maximum contractual commitment, the *Mobile-Sierra* rule would not apply to kilowatts sold under the contract in excess of the maximum contractual commitment, even though the contract had been modified by the conduct of the parties so as to eliminate the limitation on the maximum contractual commitment.

Although Mid-South was alarmed by the language contained in the August 7, 1973 order, it still assumed that the Commission would not hold that Mid-South's contract

D THROUGH

with Gulf States should receive the "initial rate" treatment by the Commission insofar as sales in excess of the maximum contractual commitment initially specified in the contract were concerned for the reason that the contract had been modified by the conduct of the parties and therefore none of these sales under the contract were outside the contract demand parameters. However, as a precautionary method, Mid-South on August 20, 1973 filed an Application For Rehearing. This was a timely filing in respect of the August 7, 1973 order. In its Application For Rehearing Mid-South requested the Commission to issue a clarifying order indicating that all sales made by Gulf States to it be made under the rates provided for in the contract until such time as the Commission might issue an order in a Section 206 proceeding. Mid-South explained the manner in which its contract with Gulf States had been amended by the conduct of the parties so as to remove the limitation on their contractual commitment. It also explained that the reason why it had not filed an Application For Rehearing of the Commission order issued June 14, 1973, was that as Mid-South understood that order, the Commission was holding that its contract with Gulf States was protected by *Mobile-Sierra* and would be investigated by the Commission in a Section 206 proceeding. Also, that it assumed that since its contract had clearly been amended by the conduct of the parties to eliminate any limitation on Gulf States' contractual commitment thereunder, Mid-South was fully protected by the *Mobile-Sierra* doctrine. Mid-South further explained that it was at that time filing the Application For Rehearing since certain of the language contained in the August 7, 1973 order might be interpreted to indicate that the Commission was of opinion that amendments to contracts resulting from the conduct of the parties were not binding on Gulf States to prevent it from unilaterally increasing its rates to Mid-South.

The United States Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Justice, U.S. District Judge for the Eastern District of Texas, sitting by designation, held that the Commission had erred in refusing to consider whether or not the Gulf States—Mid-South contract had been amended by action of the parties and in holding that only contracts which are properly filed with it can be regarded as embodying the presently effective contractual rates, terms and conditions. (—— U.S. App. D.C. ——, 515 F.2d 998 (1975)).

The court reversed and remanded the case to the Federal Power Commission, to determine whether a modification of the contract did in fact occur.

On January 12, 1976, Gulf States' motion for rehearing and request for rehearing *en banc* were denied. A stay of the court's mandate until February 27, 1976 was granted, but an extension of that stay was denied by the Court of Appeals. Further applications for stay were first denied by Chief Justice Burger and then by this entire Court.

ARGUMENT

This is not an appropriate case for which this Court should grant a writ of certiorari. The Petitioner has made no claim that the opinion below is in conflict with any decisions of this Court or a Court of Appeals. Indeed no such conflict exists. The Petitioner does argue that this case is important to the proper administration of the Federal Power Act by the Federal Power Commission. This is most clearly refuted by the decision of that Commission not to petition this Court for certiorari which it surely would have done had its ability to administer the Act properly been put in jeopardy by the court below.

In reality, this case is of extremely limited importance. What is involved in the Gulf States contract with Mid-

South is approximately $300,000 representing increased rates charged by Gulf States in a locked-in period from June 15, 1973 (the date the rate increase became effective) to April 1, 1975 (the date the Gulf States-Mid-South wholesale power contract was terminated by Gulf States). The decision of the lower court will have no prospective significance whatsoever insofar as the Gulf States-Mid-South dispute is concerned.

There is no contention by anyone that Gulf States' higher rate did not become effective on the termination of the contract on April 1, 1975. As has been made obvious by the continuation by Gulf States of all of its electric power supply business during and beyond the locked-in period involved here there is not involved in this case any question of the ability of Gulf States to render stable service.

I

Following the teachings of this Court,[2] the court below used its authority to consider the equities of Mid-South's situation. It held that Mid-South's application for rehearing was timely filed and that court has jurisdiction over Mid-South's petition for review. The correctness of its determination is attested to by the Seventh Circuit in *Natural Gas Pipe Line Company* v. *FPC*, 128 F.2d 481, 484 (1942).

II

In finding that the Federal Power Commission was under a duty to determine whether the attempt by Gulf States to increase its rates was in conflict with an existing contractual arrangement between Gulf States and Mid-South, and to include in that evaluation the claim that a course of dealing modified the terms of the

---

[2] *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373; 59 S.Ct. 301, 307; 83 L.Ed. 221 (1939).

BLEED T

contract, the court below was in no way going beyond the established bounds of the *Mobile*[3]*-Sierra*[4] doctrine. Rather, the lower court was merely applying the holdings of earlier cases to these facts. The *Mobile-Sierra* line of cases holds that contract law applies under the Natural Gas Act and the Federal Power Act to prevent unilaterally imposed rate increases which violate existing contracts. All that the court below held was that there is no hidden exception in this doctrine which excludes the basic tenet of contract law that contracts may be modified by the course of dealing between the parties.

In *Mobile*, this Court explained that the Natural Gas Act did not abrogate contract law:

> "The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." 350 U.S. 332 at 343.

The Court then emphasized that this:

> ". . . . fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *Id.*, at 344.

In *Sierra*, this Court held that the same was true under the Federal Power Act.

---

[3] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[4] *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

IF OU GH

Nothing in the Federal Power Act gives electric companies the right to ignore, for rate-making or any other purposes, modifications in contracts with particular customers arrived at by a mutual course of dealing. The refusal of the court below judicially to carve out such an exception was completely in accordance with the protection of the integrity of contracts emphasized in *Mobile*. Indeed, for the lower court to have found as Gulf States wished, it would have disrupted that integrity by holding after the fact, that the normal rules of contract law do not apply to electric companies.

As the court below noted, a major portion of the claim of Gulf States in this case had already been ruled upon and rejected in *Borough of Lansdale, Pa.* v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974), where the court ruled that even though a written contract had not been filed with the Federal Power Commission, the company was nevertheless prevented by the *Mobile-Sierra* doctrine from unilaterally filing for a rate increase contrary to the provisions of the contract. The court there emphatically rejected much the same position urged here by Gulf States:

> "The Commission and Philadelphia Electric argue that if a fixed-rate contract is not yet filed with the FPC, the Commission and the public utility which signed the contract may ignore the document and proceed, respectively, to file rates and to accept their filing as if the contract had never been negotiated. This theory has two hidden, but necessary, corollaries. The company need not file a new contract, and the Commission need not order the company to do so. These are preposterous notions. . . .
>
> "The gist of the Commission's theory is that a fixed-rate contract has no binding force, at least for regulatory purposes, until it is physically filed with, and accepted by the Commission. This stands the

> *Sierra-Mobile* doctrine on its head, for it is the purpose of that doctrine to subordinate the statutory filing mechanism to the broad and familiar dictates of contract law." *Id.*, at 1112-1113.

This same logic applies here not only to reject Gulf States' reiteration of the argument that a contract which was never filed has no *Mobile-Sierra* effect, but also to reject its contention regarding amendment by mutual course of dealing. That contention must be rejected, if "the broad and familiar dictates of contract law" are adopted.

We shall not repeat here the citations to the numerous authorities contained in the opinion of the court below in support of its statement that "the contract law has long recognized that the parties to a contract may vary its terms by a subsequent course of conduct." (515 F.2d at 1009).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM C. WISE
ROBERT WEINBERG
Suite 200
1019 19th Street, N.W.
Washington, D.C. 20036
202/659-8931

Attorneys for Respondent
Mid-South Electric Cooperative Association